Supreme Court, U.S.
FILED
JUN 8 1993
OFFICE OF THE CLERK

No. 92-1560

In The

Supreme Court of the United States

October Term, 1992

SELMAN (JOE) THOMAS, JR., et al.,

Petitioners,

vs.

METZ BAKING COMPANY, BAKERY, CONFECTIONARY & TOBACCO WORKERS UNION, LOCAL #443 and CURTIS BURTON, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF

M. H. WEINBERG
WEINBERG & WEINBERG, P.C.
The Mark
9290 West Dodge Road
Suite 205
Omaha, NE 68114-3322
Telephone: 402-397-0999

Counsel of Record for Intervenors

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

REASON FOR INTERVENORS' REPLY BRIEF 1

ARGUMENT 1

I. THE PETITIONERS CANNOT RAISE A NEW QUESTION NOT PRESENTED IN THEIR PETITION FOR A WRIT OF CERTIORARI... 1

II. RAISING THE EFFECT OF THE SEVERANCE PAY ARBITRATION (DOYLE II) IS NECESSARY AND PROPER ON THE PART OF THE INTERVENORS AS A DEFENSE TO THE PETITIONERS, ALLEGATIONS ON APPEAL THAT THE DAMAGE REMEDY IS IMPROPER 2

III. THE INTERVENORS SHOULD NEVER BE BOUND BY ANY PURPORTED AGREEMENT NOT TO RAISE THE EFFECT OF THE SEVERANCE PAY ARBITRATION (DOYLE II) BETWEEN THE UNION, THE COMPANY, AND/OR THE PETITIONERS 4

IV. ATTORNEY FEES ARE NOT CONSEQUENTIAL DAMAGES AND CAN ONLY BE AWARDED UNDER THE AMERICAN RULE UNDER VERY EXCEPTIONAL CIRCUMSTANCES NONE OF WHICH ARE PRESENT IN THIS CASE 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 249-50, 95 S. Ct. 1612, 1617-1618, 44 L.Ed. 2d 141 (1975) 6, 7

Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539, 108 S. Ct. 830, 98 L.Ed. 2d 936, 56 U.S.L.W. 4156, 127 L.R.R.M. (BNA) 2657, 108 Lab. Cas. ¶10,299, 9 Employee Benefit Cas. 1457 (1988) 8

Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated, 945 F.2d 889, 60 U.S.L.W. 2243, 138 L.R.R.M. (BNA) 2433, 120 Lab. Cas. ¶10,972 *cert. den.* 112 S. Ct. 1951, 118 L.Ed. 2d 555, 60 U.S.L.W. 3701, 60 U.S.L.W. 3775, 60 U.S.L.W. 3780, 140 L.R.R.M. (BNA) 2320, 121 Lab. Cas. ¶10,165 (1992) 4

Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America, 102 S. Ct. 2112, 72 L.Ed. 2d 511, 110 L.R.R.M. (BNA) 2441, 94 Lab. Cas. ¶13,533 (1982) 7

Woodell v. International Brotherhood of Electrical Workers, Local 71, 112 S. Ct. 494, 116 L.Ed. 2d 419, 60 U.S.L.W. 4024, 138 L.R.R.M. (BNA) 2881, 120 Lab. Cas. ¶11,010 (1992) 4

MISCELLANEOUS

Supreme Court Rule 13 2

Supreme Court Rule 14.1(a) 1

Supreme Court Rule 15 1

TABLE OF AUTHORITIES – Continued

Page

Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 ..... 4, 7, 9

Section 303 of the Labor Management Relations Act, 29 U.S.C. §187 ..... 6, 7

Employee Retirement Income Security Act, Section 502(g)(2), 29 U.S.C. 1102(g)(2) 8

REASON FOR INTERVENORS' REPLY BRIEF

Supreme Court Rule 15 provides that any party may file a supplemental brief at any time while a petition for certiorari is pending calling attention to an intervening matter not known at the time of the party's last filing. The Petitioners in their Reply Brief at Section III on page seven state that the Intervenors are without standing in the case. The Petitioners have raised an issue that was not part of their **"Questions Presented for Review"** in their Petition for Writ of Certiorari. The Petitioners thus raise a new issue not appealed after the Intervenors' Brief. The new matter raised should entitle the Intervenors to a response because the issue raised in the Petitioners' Reply Brief is a new issue.

ARGUMENT

I

THE PETITIONERS CANNOT RAISE A NEW QUESTION NOT PRESENTED IN THEIR PETITION FOR A WRIT OF CERTIORARI.

Supreme Court Rule 14.1(a) states as follows:

"The petition for writ of certiorari shall contain, in the order here indicated:

> *(a) "The questions presented for review, expressed in the terms and circumstances of the case, but without necessary detail. The questions should be short and concise and should not be argumentative or repetitious. They must be set forth on the first page following the cover with no other information appearing on the page. The statement of any question presented will be deemed to comprise every subsidiary question fairly presented therein. Only questions set forth in the petition, or fairly included*

> *therein, will be considered by the Court.*" (underlining added)

The Petitioners presented no issue or challenge to the standing of the Intervenors to intervene in the case at the Supreme Court level since no issue presented dealt with standing even remotely. The Intervenors standing to intervene thus cannot be considered by the Supreme Court. The failure to appeal the standing issue implies that the finding that the Intervenors had standing to intervene is final and binding.

It is unfair to allow the Petitioners to amend their appeal in an untimely manner for an issue which was not timely appealed pursuant to Supreme Court Rule 13.

It is even more unfair to allow the Petitioners to lay in waiting until the Intervenors have filed their brief based upon a response to the three questions presented and then bring up the standing issue which was not raised until after the time for petitioning on the standing issue has passed. The Petitioners should be foisted on their own petard. The standing issue should not be reviewed.

II

RAISING THE EFFECT OF THE SEVERANCE PAY ARBITRATION (DOYLE II) IS NECESSARY AND PROPER ON THE PART OF THE INTERVENORS AS A DEFENSE TO THE PETITIONERS' ALLEGATIONS ON APPEAL THAT THE DAMAGE REMEDY IS IMPROPER.

The Petitioners now take the position that even if the remedy granted by the Eighth Circuit is proper for a

failure to negotiate case, it is not proper for a breach of contract case since the collective bargaining agreement was never modified. Should the Petitioners prevail on that issue then the only defense is that under that very same collective bargaining agreement, the receipt of severance pay is sufficient to bar reinstatement and/or damages. That is the very position espoused by the Intervenors since their intervention. No other party presented or argued that position. That is probably why the Petitioners have now attacked the standing of the Intervenors on appeal. For if the Intervenors have no standing, then no other party can raise or has raised the effect of the severance pay arbitration (Doyle II).

Basically the Intervenors say that if you want to enforce the collective bargaining agreement, then enforce all of it including the parts covering the effect of receipt of severance pay. That is the argument made in the Intervenors' initial brief.

That argument is both material and relevant to the determination as to the proper enforcement of the collective bargaining agreement.

One need not remand the case to the Eighth Circuit, for if one finds that the Petitioners lost all rights to jobs, seniority, recall rights, or damages based upon the loss of same by accepting the Doyle II award and the monies therefrom, then the decision of the Circuit Court should be sustained. The defense of the effect of the severance pay arbitration can resolve all arguments with regard to the enforcement of the collective bargaining agreement, thus barring the Petitioners' rights to jobs and damages, and, if that is the case, providing another ground for

upholding the decision of the Eighth Circuit and denying the prayer of the Petitioners. The Petitioners must again be foisted on their own petard. If they make their bed, then they must lie down on it. The Petitioners arbitrated severance pay issues in Doyle II. Doyle II was reviewed by Judge Robinson and found to be sound. The Petitioners received their money. They thus have no jobs or damages due.

III

THE INTERVENORS SHOULD NEVER BE BOUND BY ANY PURPORTED AGREEMENT NOT TO RAISE THE EFFECT OF THE SEVERANCE PAY ARBITRATION (DOYLE II) BETWEEN THE UNION, THE COMPANY, AND/OR THE PETITIONERS.

For the reasons stated at Page 9 of the Intervenors' Brief, the Intervenors are not bound to any Stipulation in Civil No. 83-0-560 which allegedly agreed to waive the effect of the receipt on future damage issues. The cases cited therein are incorporated by reference herein.

Further, even if the Stipulation is binding on the parties, other than the Intervenors, in a recent case, the failure to seek a democratic vote of the Union members as required by the Union By-Laws and Constitution voids any side-agreements. See *Merk v. Jewel Food Stores Division of Jewel Companies, Incorporated*, 945 F.2d 889, 60 U.S.L.W. 2243, 138 L.R.R.M. (BNA) 2433, 120 Lab. Cas. ¶10,972, *cert. den.*, 112 S. Ct. 1951, 118 L.Ed.2d 555, 60 U.S.L.W. 3701, 60 U.S.L.W. 3775, 60 U.S.L.W. 3780, 140 L.R.R.M. (BNA) 2320, 121 Lab. Cas. ¶10,165 (1992). The issue of the propriety of any side agreement can be raised in a 301 action. See *Woodell v. International Brotherhood of Electrical*

Workers, Local 71, 112 S. Ct. 494, 116 L.Ed 2d 419, 60 U.S.L.W. 4024, 138 L.R.R.M. (BNA) 2881, 120 Lab. Cas. ¶11,010 (1992).

Thus without a vote on the effect of the release the collective bargaining agreement could not be modified to allow the Petitioners to avoid the effect of receiving severance pay.

Both the Eighth Circuit and the Trial Court reviewed carefully the Union Constitution and By-Laws and determined that votes are required to modify the collective bargaining agreement. Yet where was the vote modifying the contract allowing the Petitioners to avoid the effect of receiving severance pay?

It is absolutely essential for the Intervenors to enter the case to assert Doyle II and the severance pay argument when neither the Union nor the Company does such at any time. And where the damages assessable against the Union and the Company can be reduced by giving up jobs held by the Intervenors to the Petitioners thus cutting future damages, it does not take a mental giant to see that the Intervenors' rights could be sacrificed.

The majority of the bargaining unit could not afford to be a silent majority and let their rights under the contract be abrogated.

IV

ATTORNEY FEES ARE *NOT* CONSEQUENTIAL DAMAGES AND CAN ONLY BE AWARDED UNDER THE *AMERICAN RULE* UNDER VERY EXCEPTIONAL CIRCUMSTANCES NONE OF WHICH ARE PRESENT IN THIS CASE.

Let's face it, if the Union and the Company are jointly and severally liable for damages, and those damages include a healthy slug of attorney fees, then the members of the Union will pay, including the large number of Metz workers which includes the Intervenors. The Intervenors have a stake in the outcome of the attorney fees issue.

The essence of the Petitioners' argument on attorney fees is that they are part of the consequential damages and are literally mandatory. Thus the Eighth Circuit and the Trial Court are in error in failing to award attorney fees.

To date, no party has cited a key case that held that under 29 U.S.C. 187 attorney fees are not consequential damages. That case involved a lawsuit by an employer under Section 303 of the Labor Management Relations Act of 1947 as amended. Justice Marshall carefully analyzed the history of the labor act and the pertinent section and found the following:

(1) *In the absence of an express statutory declaration, attorney fees are not allowable of right.*

(2) *That, if there is no express statutory right, then the American Rule as stated in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 249-250, 95 S.Ct. 1612, 1617-1618, 44 L.Ed. 2d 141 (1975) applies.*

(3) *Then, only certain exceptional events will allow the assessment of attorney fees.*

See *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* 102 S.Ct. 2112, 72 L.Ed. 2d 511, 110 L.R.R.M. (BNA) 2441, 94 Lab. Cas. ¶13,533 (1982).

It would be somewhat incongruous for attorney fees to be allowed automatically without statutory authority under Section 301 and yet not have them allowed to the employer under Section 303.

If one were to review the citations of *Alyeska* in the Courts, one would find that since 1975 more than 1,500 cases have relied upon the decision and its rationale. It would also seem incongruous to have a well established precedent overturned to allow mandatory attorney fees under Section 301 and yet bar mandatory attorney fees under 303 while both sections 301 and 303 are in the same Act. A unanimous Supreme Court in the *Summit Valley* case, could find no policy to make the word "damages" include attorney fees. The Supreme Court in the second to last paragraph of that case came right out and concluded that the damages do not include attorney fees. Similarly, "damages" under Section 301, should not automatically include attorney fees.

The Trial Court held and the Circuit Court approved the factual finding that attorney fees should not be allowed because none of the special circumstances were proven to exist. There has been no appeal of that factual determination. It is final and binding.

The major premise that Section 301 (29 U.S.C. 185) does **not** allow mandatory attorney fees as consequential

damages is supported by congressional intent demonstrated by the fact that when Congress wanted to legislate mandatory attorney fees for collection of delinquent contributions they had to enact a whole new law, 29 U.S.C. 1102(g)(2), also known as Section 502(g)(2) of ERISA. If Section 301 provided for mandatory attorney fees in the eyes of Congress then that Statute would not have to have been enacted, it would have only required mandatory pre-judgment interest and liquidated damages. For a discussion of the legislative history of Section 502(g)(2), see *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 108 S. Ct. 830, 98 L.Ed. 2d 936, 56 U.S.L.W. 4156, 127 L.R.R.M. (BNA) 2657, 108 Lab. Cas. ¶10,299, 9 Employee Benefits Cas. 1457 (1988). That case could also be cited for the proposition that Congress also felt that Section 301 did not provide for mandatory pre-judgment interest and thus had to enact a specific provision allowing same for fringe benefit contributions. Congress did not intend Section 301 to provide for either mandatory attorney fees or mandatory pre-judgment interest.

Mandatory attorney fees should not be granted. Further mandatory pre-judgment interest should not be granted either. The Circuit Court's findings that neither is appropriate should be upheld as appropriate factual findings not attacked on appeal.

CONCLUSION

The Petitioners should not be allowed to raise, at this late date, the issue of the standing of the Intervenors. That issue was resolved by the Circuit and the Trial Court and has not been properly and timely appealed.

The Intervenors have the right to argue the effect of Doyle II as severance pay eliminates both damages in this case and the right of the Petitioners to take jobs for which they have no seniority.

The Intervenors preserved their right to argue the effect of severance pay throughout this case. If there was a side agreement not to raise the issue by the Union, the Company, and the Petitioners, then the Intervenors are not bound by that Stipulation without a vote of the rank and file members entitled to vote on contractual modifications.

Lastly, attorney fees are not consequential damages to be awarded of right in a 301 case. Exceptional circumstances must be shown. There were none proven. The Petitioners did not appeal the Circuit's determination that there were none, so no attorney fees can be allowed. The same reasoning should apply for pre-judgment interest. Pre-judgment interest should likewise not be allowed.

Respectfully submitted,

M.H. WEINBERG, #14435
WEINBERG & WEINBERG, P.C.
9290 West Dodge Road
Suite 205
Omaha, Nebraska 68114
Telephone: 402-397-0999

Counsel for Intervenors